(4) (2)

Nos. 87-1939 and 87-2008

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF OF PETITIONERS

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QUESTION PRESENTED

The United States Virgin Islands is a group of three Caribbean islands located approximately 1500 miles from the continental United States. It is an unincorporated territory in which a federally established court, the District Court of the Virgin Islands, is both the federal trial court and the court of appeals for the territorial courts. The district court's rules provide that one must be a resident of the territory in order to be admitted to the bar. The United States Court of Appeals for the Third Circuit, sitting *en banc*, held that this Court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), was binding precedent requiring the exercise of the circuit's supervisory power to invalidate the Virgin Islands residency rule.

The Question Presented for review by this Court is:

Whether the decision in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), prohibits a federal court in the unincorporated territory of the United States Virgin Islands from requiring residence as a requisite for the practice of law.

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The United States District Court of the Virgin Islands held that several substantial reasons exist to justify the residency requirement. Moreover, the discrimination practiced against nonresidents was held to be the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar. The district court's decision is unreported and appears at pages 58a to 67a of the appendix to the petition for a writ of certiorari.[1] Pet. App. 58a to 67a.

On appeal to the United States Court of Appeals for the Third Circuit, a three judge panel found that *Frazier v. Heebe* required the circuit to exercise its supervisory powers over the District Court of the Virgin Islands, and the circuit reversed the district court's decision. The panel's decision was originally reported at 829 F. 2d 463 (3d Cir. 1987), but was later withdrawn from the bound volume because the circuit court granted rehearing *en banc* and the panel judgment and opinion was vacated. The opinion of the panel appears at Pet. App. 35a to 57a.

Following a Rehearing *en banc* before the Third Circuit, the judgment of the district court was reversed. The *en banc* decision of the court is reported at 842 F. 2d 1393 (3d Cir. 1988) and is reprinted at Pet. App. 1a to 34a.

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[1] All references herein to the appendix to the petition for a writ of certiorari refer to the appendix filed by petitioner Geoffrey W. Barnard in No. 87-1939 and are described by the designation "Pet. App.". The designation "Jt. App." is used to describe items in the joint appendix filed herewith.

JURISDICTION

The opinion of the court of appeals following the Rehearing *en banc* was filed on March 31, 1988. Petitions for a writ of certiorari were timely filed on May 23, 1988, by Geoffrey Barnard, as Chairman of the Committee of Bar Examiners and on June 6, 1988 by the Virgin Islands Bar Association. Both petitions were granted on June 30, 1988, and consolidated for purposes of appeal.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following:

Revised Organic Act of the Virgin Islands of 1954, §§ 21 through 25, and 27 codified at 48 U.S.C. §§ 1611-1615, 1617, and Rules of the District Court of the Virgin Islands, V.I. Code Ann. Tit. 5 App. V Rule 16 and Rule 56(b) (4) and (5) (1982). All of these provisions are set forth in the appendix to the petition for a writ of certiorari.

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STATEMENT OF THE CASE

Appellees Susan Esposito Thorstenn and Lloyd DeVos (hereinafter "applicants") are attorneys at law, having been admitted to practice before certain state and federal courts. Thorstenn and DeVos are residents of New York and New Jersey, respectively, and both maintain offices

for the practice of law in New York. However, neither applicant intended to take up residence in the Virgin Islands. Jt. App. 31. In May of 1985, the applicants filed petitions with the United States District Court of the Virgin Islands (hereinafter "the district court") seeking admission to the Virgin Islands Bar Association (hereinafter "the Bar"). The rules of admission to the Bar, as well as the rules of practice, are established by the district court. Those rules provide, inter alia, that admission to the Bar as an active member requires that, the applicant, "[i]f admitted to practice, . . intends . . . to continue to reside in and to practice law in the Virgin Islands." V.I.C. Code Ann. Tit. 5 App. V R 56(b)(5). Accordingly, under the rule cited, the Committee of Bar Examiners (hereinafter "the Bar Examiners") declined to certify them as qualified to sit the bar examination or to be admitted to the bar.

The applicants then sought a declaratory judgment in the district court arguing that the residency requirement was unconstitutional, citing the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution as interpreted in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Jt. App. 13-19.

Both applicants were permitted by court order to sit and both passed the Virgin Islands bar exam. Jt. App. 26-27. Due to the applicants' failure to satisfy the residency rule, the Bar Examiners declined to certify them qualified for admission to the bar.

The applicants then filed motions for summary judgment, and the Bar Examiners filed a cross-motion for sum-

mary judgment, each relying on affidavits submitted in support of their respective contentions. On motion, the Bar was permitted to intervene as a party in interest and the Bar also moved for summary judgment.

In support of the Bar's motion, an affidavit of the president of the Bar was submitted. Her affidavit described telecommunications between the Virgin Islands and the mainland U.S. as "erratic," involving "conversations . . . frequently impaired by static, echoes, transmission gaps and disconnection." Jt. App. 44. She also described the responsibility under the district court's rules of practice, requiring all members of the Bar to "accept appointments to represent indigent criminal defendants approximately four times per year. These appointments require the attorney to appear for hearings and face-to-face consultations with the defendants on short notice." Jt. App. 44-45. She also described the "very lengthy delay between the issuance of opinions by the Virgin Islands Courts and their publication, if they are published." Jt. App. 45. As of the date of the affdavit (October 7, 1986) the "most recent volume of the Virgin Islands Reports contained opinions issued in 1983 and early 1984.[2] Slip opinions are generally . . . available only by reviewing the opinions in the office of the law clerks for the District Court judges," and many significant opinions are 'published' only in the photocopied St. Croix and St. Thomas Supplements in the court's library. Jt. App. 45.

The Bar's affidavit also described the limited resources of the small bar and its volunteer committee on

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[2] The most recent volume of the Virgin Islands Reports, published in 1987, contains opinions entered by the courts in 1984 and 1985.

ethics and grievances. This small group, according to the affidavit, would find it "virtually impossible" to effectively handle the surveillance of nationwide bar members. Jt. App. 45.

The Bar Examiners submitted the affidavit of the Chairman of the Committee of the Bar Examiners, who was also the Clerk of the District Court. In addition to corroborating much of the content of the Bar's affidavit, the Bar Examiners' affidavit described the physical characteristics of the territory, located some "1500 miles from the Continental United States" reachable "only by air or by sea." Air travel from the closest point in the mainland "takes not less than 2½ hours." Jt. App. 37. The Bar Examiners' affidavit noted the virtual unavailability of air reservations at certain times of the year, particularly in the Caribbean's tourist season. The alternative, travel by sea, "takes at a minimum of several days of sea travel from the closest mainland point." Jt. App. 37. Agreeing that telephone service was unreliable, he noted also that "mail delivery is often unreliable and almost always involves material delay." Jt. App. 38.

The Bar Examiners' affidavit also described the court's experience with *pro hac vice* admissions. According to the Chairman and Clerk of the Court, these admissions, even though limited in number, had caused many problems, particularly when stateside counsel could not appear at a hearing due to travel obstacles, and their local counsel, when called on to appear, answered he could not be ready because he relied on stateside counsel as "lead counsel." The court's already congested calendar would, if general nonresident admission were allowed, "almost certainly become totally unmanageable." Jt. App. 40.

In support of their claim, applicants submitted the affidavit of Lloyd DeVos, one of the applicants. He stated that in the 18 month period he had been associated with a partner in St. Thomas, he had travelled to the Virgin Islands "approximately 20 times" and had never been unable to obtain a reservation, either on a direct flight or through Miami and Puerto Rico. Jt. App. 32-33. He stated that telephone communications between the Virgin Islands and the United States is at "mainland standard." He stated that conferences with clients, other lawyers, and court officials "are easily accomplished by telephone and telex." Jt. App. 33-34.

After receipt of all affidavits, the district court ruled on the motions, and having found that there were substantial reasons justifying the residency requirement in the special circumstances of the territory, granted summary judgment to the Bar Examiners. Pet. App. 58a to 59a.

The district court, applying the analysis of *Piper*, found the facts underlying the Virgin Islands' rule distinguishable from those evident in New Hampshire. Citing difficulties in travel to and from the mainland, erratic telephone service which is sometimes unavailable altogether, undependable document transport, unavailability of Virgin Island statutes, legal reports and opinions on the mainland due to protracted delays in publication, one of the heaviest judicial case loads in the entire United States district court system and the resulting need for highly efficient management of case loads which would be materially undermined by "interruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands," and the obligation of all practicing

attorneys in the territory to share the responsibility to represent indigent criminal defendants, a feat virtually impossible for nonresidents to effectively perform, the court concluded that "the discrimination practiced against nonresidents . . . is the least restrictive means of preventing the harm which would be caused . . ." by their admission. Pet. App. 67a.

The applicants then appealed to the United States Court of Appeals for the Third Circuit, where the circuit considered arguments not only on *Piper* and the Privileges and Immunities Clause, but also on the applicability of the court's supervisory powers as used in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987).[3] A three judge panel of the court of appeals, in a split decision relying on *Frazier*, concluded it was bound to exercise its supervisory powers over the district court to strike the rule, and reversed the district court decision. The matter was then reheard *en banc*, where a majority determined that *Frazier* was binding precedent even as to the Virgin Islands, and issued an opinion reversing the district court and directing the lower court to enter summary judgment in favor of the applicants.

A petition for certiorari was filed by Geoffrey W. Barnard, Chairman of the Board of Bar Examiners of the Virgin Islands, on May 23, 1988. A petition was also filed by the Virgin Islands Bar Association on June 6, 1988. Both petitions were granted on June 30, 1988, the

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[3] *Frazier* was decided after the decision of the district court was entered, and after oral argument before the circuit. Its applicability was first briefed at the request of the court of appeals after argument.

proceedings being consolidated by order of the Court. This brief is submitted jointly by both petitioners.

I. THE DISTRICT COURT OF THE U.S. VIRGIN ISLANDS IS SO GEOGRAPHICALLY AND FACTUALLY DISTINCT FROM FEDERAL COURTS OF THE MAINLAND UNITED STATES THAT APPLICATION OF THE SUPERVISORY POWER TO STRIKE ITS RESIDENCY RULE IS IMPROPER.

The decision below, rendered by a deeply divided circuit,[4] incorrectly treats this Court's opinion in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), as requiring that all federal courts, wherever located, and whatever their special circumstances, adhere to a single rule that residence may not be required for admission to the practice of law.

This Court's holding in *Frazier*, however, was considerably narrower than the court of appeals' decision below. *Frazier* held that the district court was not empowered to adopt its local rules to require members of the Louisiana state bar who apply for admission to the federal bar to live in, or maintain an office in, Louisiana where the court sits. 107 S.Ct. at 2613-14.

The *Frazier* Court began its analysis by expressly recognizing "that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business," and that this "authority includes the regulation of admissions to its own bar." The Court also noted that such rules must be "consistent with the principles of

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[4] Eight members of the Court of Appeals for the Third Circuit joined the majority opinion. Five members dissented. Pet. App. 10a.

right and justice" and, of course, with the rules of practice and procedure established by the Supreme Court. 107 S.Ct. at 2611.

Examining the justification proffered for its rule by the Eastern District of Louisiana, the Court found neither necessity nor rationality on the evidence presented. While the Eastern District claimed its rule served the important objective of "the efficient administration of justice" because "proximity to the New Orleans courthouse" was "important when emergencies arise during proceedings", the evidence established that the applicant lived only 110 miles away, while lawyers residing in the state might live three times that distance from the court. The only difference between their plights was a state boundary crossing the nonresident's path. Obviously, the justification of the Louisiana rule could not rationally be tied to efficient judicial administration. 107 S.Ct. at 2613.

The second important reason for the rule cited by the Eastern District was the fear that nonresidents of the state would be "less competent" in matters of local law than residents. Again the lesser competence was not proven, especially since the applicant was a member of the Louisiana state bar, already practicing before the state courts. The court was "unwilling to assume that a nonresident-lawyer—any more than a resident—would disserve his clients by failing to familiarize himself [or herself] with the [local] rules." 107 S.Ct. at 2612.

The improbability of that assumption being true was heightened, in the Court's view, by the fact that the rule at issue was a federal trial court's rule. The Court noted that presumed lack of competence among nonresident at-

torneys was even more difficult to justify in the context of federal court practice than it was in the area of state court practice, "where laws and procedures may differ substantially from state to state. There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." 107 S.Ct. at 2612 n.7.

The *Frazier* Court did not say that efficient judicial administration was not an important and significant governmental interest. It did not say that encouraging availability and competence in local law are unnecessary or irrational goals. It said, instead, that those goals could not be shown to be advanced in any meaningful way by the Louisiana rule under those facts.

Compare the facts in the Virgin Islands with those in *Frazier* and an example of compelling justification emerges on the very points at which the Louisiana rule proved irrational and unnecessary. For the admittedly important goal of efficient judicial administration, the Virgin Islands presents a situation in which it is certain that residents are more readily available than nonresidents. Substantial difficulties in travel between the Virgin Islands, a tourist destination, and the mainland were emphasized by the district court. Pet. App. 64a-65a. Indeed, one living 110 miles from the courthouse in the Virgin Islands would have to be a resident of the high seas. Even dispatching notice of a hearing, whether by mail or telephone, is a dramatically more difficult problem in the Virgin Islands/mainland context than in the case

of jurisdictions within the continental United States.[5] While modern, virtually instantaneous, communications may be taken for granted in Washington, D.C. or New Orleans, in the Virgin Islands such communications are not dependable. In the words of the dissenting judge of the court of appeals below:

> I find it particularly disheartening that the distinguished federal judges of this Court have so easily written off as irrelevant their own experiences with the transportation and communication problems that plague the Virgin Islands. Even if only some members of this Court have had the frustrating experience of mailing case files to the Virgin Islands weeks before a sitting, only to learn that they are not available when they arrive to hear argument, or have had their judicial patience tested as they have waited for the connection of a phone call between the continental United States and the Virgin Islands, we should heed Chief Justice Taft's pointed observation that "[a]ll others can see and understand this. How can we properly shut our minds to it? *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 27, 42 S.Ct. 449, 450, 66 L.Ed. 817 (1922), quoted in *Gomillion v. Lightfoot*, 270 F.2d 594, 608 (5th Cir.

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[5] The district court noted in its opinion that mail delivery to the mainland often takes more than five days. Pet. App. 66a. Recently, congressional hearings initiated by Virgin Islands Delegate Ronald DeLugo revealed that only 65 percent of the first-class mail sent from the continental mainland to the territory is delivered within three days. Letters from almost 150 Virgin Islanders were accepted into evidence at the hearing and described the loss of business opportunities and credit as a result of the delay caused by the mail service to the Virgin Islands. The Postmaster General of the United States also agreed that the territory experienced serious problems with mail delivery. — Cong. Record — (July 14, 1988) (transcript of proceedings not yet available).

1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Pet. App. 33a-34a.

Furthermore, the administrative burdens on the District Court of the Virgin Islands are extraordinary. There were, at the time of the decision below, only two federal judges in the Virgin Islands. Statistics gathered by the Administrative Office of the United States Courts for the year 1987 (the most recent available) indicate there were, on average, 466 pending cases per judgeship in the district courts of the United States, whereas in the Virgin Islands there were 628 pending cases per judgeship. **Administrative Office of the Courts, Federal Court Management Statistics**, 60, 167 (1987). This placed the Virgin Islands first in the Third Circuit, and first in the entire United States in number of pending cases per judgeship. *Id.* at 60. The territory thus has a massively disproportionate case load per judge to manage and conclude on a timely basis. Faced with this imposing judicial burden, the district court concluded that the residency rule was indispensable to any semblance of efficient judicial administration, given the extreme difficulties associated with travel and communication between the islands and the mainland. Pet. App. 55. Thus, while the goals and concerns of the Eastern District and of the district court in the Virgin Islands may be similar, the necessity and rationality of their rules as a method to achieve those goals is quite different.

Similarly, in the matter of competence in local law, the *Frazier* Court recognized the inequity in an assumption that nonresidents would be less diligent than residents in remaining knowledgeable in local law. In the

Virgin Islands, no such assumption is required. The evidence, uncontradicted, established that the local law of the territory is simply not available on a current basis to nonresidents. Jt. App. 45. The Virgin Islands' limited budget and small court and legislative staffs, lead to long delays in publication of statutes, regulations and opinions, except for photocopies in the district court library and senate chambers. Even the most conscientious nonresident could not routinely fly to the territory to do research.[6] Unlike the rule of the Eastern District, the Virgin Islands District Court rule does not exclude persons already members of a state bar, practicing before state courts, thereby demonstrating their competence in local law. The Virgin Islands Bar is integrated, V.I. Code Ann. Tit. 5 App. V Rule 51(a) (1982), and the district court's rule controls all admissions to practice on a uniform basis. On the issues examined in *Frazier*, the Virgin Islands is as far removed from the factual setting there described as it is from the state of Louisiana.

In addition to concerns about counsel availability as a substantial factor in the courts ability to efficiently manage its own calendar, and the ability of nonresident attorneys to maintain adequate familiarity with evolving Virgin Islands law, the district court noted other substantial concerns which are addressed by the Virgin Islands rule, which were not at issue in *Frazier*. These include the

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[6] Neither of the two major American computerized legal research databases, West Law and Lexis, include Virgin Islands Reports or the Virgin Islands Code. The case reporters and statutes of the other unincorporated territories are likewise excluded; except that West Law includes the insurance statutes of Guam in its database, designated GUIN-ST.

limited ability of the Virgin Islands Bar, a small association staffed entirely on a voluntary basis and operated on a very modest budget, to adequately supervise the ethics of a nationwide bar membership, and the unworkability of possible alternative means of securing communication with the court as mentioned in *Piper v. New Hampshire*, 470 U.S. 274, 286 n. 21 (1986). Pet. App. 65a, 67a. For example, the possibility of substituting telephone conferences for in person conferences with distant nonresidents is not a feasible alternative in a jurisdiction in which telephone communications are not reliable.

Of great concern to the lower court was the need of the Virgin Islands to sustain the defense of indigent criminal defendants by a requirement that all active members of the Virgin Islands Bar share the responsibility to provide representation to this group with only nominal payment. As the court pointed out, the Virgin Islands by rule requires all members of the bar to share this responsibility. Pet. App. 66a. *See also*, V.I. Code Ann. Tit. 5 App. V Rule 16(a) (1982) (reprinted at Pet. App. 75a.). At the district court level this involves approximately four appointments a year, requiring the attorney to meet with his client, appear for calendar calls, arraignments, pretrial motion proceedings, and, of course, trial. Jt. App. 44. (affidavit of Patricia D. Steele). For a nonresident to adequately fulfill this responsibility to a criminal defendant incarcerated in the Virgin Islands, in the view of the district court, would be unworkable. Pet. App. 66a. All of the previously mentioned obstacles, including problems in securing travel arrangements and telephone communications, would tend to inhibit proper representation. In the opinion of the district court, since the rule required that

appointed counsel confer with his client at his place of incarceration within five days of the order, and since mailing frequently takes more than five days to the continental United States, it is virtually impossible to imagine nonresidents meeting their obligations under this rule. *Id.* Without a doubt, such nonresidents would seek exemption from this responsibility which is borne by all resident members of the bar.[7]

Obviously, compliance with the mandate of the Speedy Trial Act, 18 U.S.C. § 3161 (1982), is an important governmental goal, as is fulfilling the obligation to secure adequate counsel to all persons charged with crimes. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (holding that the right to the assistance of counsel, as guaranteed by the Sixth Amendment, is necessary to insure the fundamental human rights of life and liberty). In the Virgin Islands the local government and the courts have long concluded that the only way this obligation can be met is by calling upon all active members of the bar to share the responsibility with the small public defenders office. If the residency requirement were forbidden, either nonresidents would be forced to take their equitable share of such appointments, thereby increasing the risk that indigent defendants whom they were appointed to represent would experience substantial delays in their ability to confer with counsel and other detriments, the court would risk

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[7] Indeed, the applicants here contended before the Third Circuit that this rule, requiring universal representation of indigent criminal defendants, should also be stricken as to nonresident attorneys, because it would be too burdensome for them to share this responsibility. The circuit did not reach this issue but remanded it to the district court for "further consideration." Pet. App. 8a n.4.

possible sanctions under the Speedy Trial Act including dismissal of otherwise meritorious charges, or nonresidents would be permitted to practice as a special elite class, not sharing this responsibility with their resident counterparts.[8] Whatever may have been intended by the decision in *Frazier v. Heebe,* it cannot be seriously contended that a system in which nonresidents are given preference and advantage over residents in the practice of law would constitute a rule consistent with "the principles of right and justice."

Prior to the *Frazier* opinion, the Third Circuit had long held the Virgin Islands' geographic isolation and other special circumstances led to a series of consequences for the courts and the bar which constituted substantial reasons to exclude nonresidents from the practice of law in the islands. *Aronson v. Ambrose,* 479 F.2d 75 (3d Cir.), *cert. denied,* 414 U.S. 854 (1973). The court had recognized in *Aronson* that

> . . . as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were compelled to defend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

479 F.2d at 78.

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[8] The obligation to serve as defense counsel for indigents, both in the district court and the territorial court, as well as the duty to serve on appointment as counsel to indigent parties in the family court, are not voluntary "pro bono" services in the Virgin Islands, but are a mandatory part of each admitted attorney's practice. Pet. App. 65a-66a.

The possible effects of such a judicial collapse upon an island community already struggling with one of the highest per capita crime rates in the nation, is a substantial reason for the rule.[9]

Additionally, all admitted Virgin Islands lawyers are required to share the duty to provide representation to abused children, juvenile delinquents, and certain other categories of persons in the territory's family court, on a rotating basis. V.I. Code Ann. Tit. 5 §§ 2505 and 2542 (Supp. 1987). Consequently, the residency requirement in this territory is deeply and inextricably entwined with the islands' efforts to meet their obligations to those whom moral duty and the Constitution demand receive fair legal representation.

In the decision below the Third Circuit did not reverse *Aronson*. Indeed, the majority opinion did not conclude that the Virgin Islands residency requirement was no longer founded on the same substantial reasons which the court had previously recognized. Rather, it concluded that *Frazier* mandated the exercise of its supervisory

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[9] According to the **U.S. Department of Commerce, Statistical Abstract of the United States, 1988** (10th ed 1988) the per capita income in the U.S. Virgin Islands is lower than the per capita income among all 50 states. Moreover, statistics maintained by the FBI in the Uniform Crime Reports for the year 1984 indicate that the Virgin Islands has the highest per capita felony crime rate in the United States. **U.S. Department of Justice, Crime in the United States** (1985). The high crime rate, coupled with a relatively low per capita income, results in the high level of indigency among criminal defendants previously mentioned and the particularly heavy demand on the district court to expeditiously move the criminal calendar. This judicial burden is by necessity, in view of the limited size of the public defenders office, translated into special responsibilities on the part of all practicing members of the Bar.

power to void the residency rule, Pet. App. 8a, apparently without regard to whether that rule, in the context of a remote territory, is justified by substantial reasons.[10]

This Court's opinion in *Frazier*, however, did not mandate such a result. The test there applied, which the Louisiana rule failed, was not a *per se* rule against residency requirements. Instead, it was a test of necessity and rationality. 107 S. Ct. at 2612. The Court concluded that in the circumstances there presented, the Eastern District's residency rule lacked both. For one of the circuit courts now to expand the *Frazier* holding into a system-wide absolute prohibition on residency requirements would be to deny the unincorporated territorities the flexibility to cope with the peculiar circumstances of their districts.

The particular circumstances affecting the practice of law in the Virgin Islands all begin with the geographical isolation of the small island group: lack of reliable, readily available transportation to and from the mainland, difficulty in document transmittal, and telecommuni-

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[10] The court of appeals explained:

> . . . we are convinced that the Supreme Court of the United States did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented. . . . We conclude that *Frazier* must be viewed as generally applicable to the United States district courts. We have no doubt, therefore, that it is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise.

Pet. App. 7a.

cations deficiences, rendering alternative means of legal intercourse undependable.[11]

The factual circumstances which distinguish the Virgin Islands do not stop there. In the Virgin Islands the legal practioner must study anew which provisions of the United States Constitution apply, what the jurisdiction of a district court includes, and whether federal statutory law is applicable to the territory.[12]

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[11] Affidavits filed with the district court by examiners of the Virgin Islands Bar stated, *inter alia, that* (1) "particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights," (2) "[i]t is often difficult to secure a long distance [telephone] connection to a distant point, or to maintain a fully audible converation without interference from static, voice fade outs, transmission gaps, or disconnections," and (3) "[m]ail delivery is often unreliable and almost always involves material delay." Jt. App. 37. (affidavit of Geoffrey Barnard). Similarly, the President of the Virgin Islands Bar Association stated that, "while telecommunications between the Virgin Islands and the Continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections." Jt. App. 44. (affidavit of Patricia D. Steele). The Bar Examiners' affidavit also stated that "[t]he resources of the small Virgin Islands Bar could never accommodate a serious and adequate investigation into the professional competence . . . or the ethical standards of nonresident lawyers." Jt. App. 39-40. (affidavit of Geoffrey Barnard).

[12] The provisions of the United States Constitution do not all apply in the Virgin Islands. *See,* Revised Organic Act of the Virgin Islands of 1954 § 3, 48 U.S.C. § 1561. Neither is the jurisdiction of the District Court of the Virgin Islands the same as that of the district courts in the 50 states. *See,* Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. 1612. Not all federal statutes apply to the territory. For example, the provisions of the Federal Arbitration Act are enforceable in the

(Continued on following page)

If the non-resident attorney seeking to practice in the islands did not find those circumstances undermined his ability to function effectively, he would encounter further difficulties resulting from linguistic differences between the mainland and the Virgin Islands.[13]

(Continued from previous page)

District Court of the Virgin Islands. *Econo-Car Int'l v. Antilles Car Rental, Inc.*, 499 F.2d 1391 (3d Cir. 1974). Much of the Federal Labor Law is not. 29 U.S.C. §§ 101, 113(d) (1982). *See also, International Longshoremen's and Warehousemen's Union CIO v. Wirtz*, 170 F.2d 183 (9th Cir. 1948), *cert. denied*, 336 U.S. 919, *reh'g denied*, 336 U.S. 971, *cert. denied*, 337 U.S. 915 (1949). Neither does the federal statute governing judicial disqualification apply to the District Court of the Virgin Islands, which "is not among the district courts enumerated in the Judicial Code, but, instead, is created by the Revised Organic Act of the Virgin Islands, . . . is given a different name and both the court and its judges possess attributes different from those of the Federal District Courts and district judges. . . ." *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 931 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975)

[13] Cases in the Virgin Islands in which defendants have been permitted to retain stateside counsel *pro hac vice* have resulted in the need for the court to appoint an interpreter to translate the witness' West Indian dialect for the nonresident attorney. *See, Government of the Virgin Islands v. Gereau*, 502 F. 2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). In a proceeding against a defendant represented by a recently appointed public defender who had just moved to the islands from the mainland, on appeal, a post trial motion filed under 28 U.S.C. § 2255 (1982) required remand to the trial court where the defense counsel acknowledged during the trial that he was "only understanding about 30% of the witnesses' testimony." *Government of the Virgin Islands v. Blyden*, nos. 86-3346, 86-3372, 86-3409, slip op. at 14 (3d Cir. January 5, 1988). While failures in the judicial process due to inability to communicate effectively between counsel and client, or counsel and witness, are relatively uncommon in the reported cases (probably due to the relatively few attorneys practicing without having fully familiarized themselves with territorial dialects and pronunciation) these failures could become epidemic if residency was stricken from the requirements for practice.

For all these reasons, the residence requirement in the rules of the District Court of the Virgin Islands is both necessary and rational. The court of appeals in its majority decision failed to review the rule under that standard. Instead, it treated *Frazier* as having decided that neither availability of counsel for court proceedings or attorney competence in local law can be considered sufficiently important purposes to justify residence-related bar requirements. The overlooked analysis in *Frazier*, as the court of appeals sought to apply it here, was an examination of the facts and circumstances of the specific jurisdiction as they relate to the purposes sought to be advanced. A rule may be irrational and unnecessary in one setting but absolutely critical in another. Perhaps the court of appeals was led to believe that the Court intended a blanket prohibition on residency requirements in the federal courts by the unqualified language used in some portions of the *Frazier* opinion. However, a careful reading of the test there applied clearly indicates the Court's intention to prohibit only rules which are unnecessary and irrational, as the dissent below argued.

> Surely the *Frazier* "unnecessary and irrational" test, . . . does not articulate a *per se* rule against residency requirements. If anything, the instant case shows that there are wide regional differences within our federal court system. Thus, while *Frazier* recognized that federal district courts are part and parcel of a federal system in which "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries," *Frazier*, 107 S.Ct. at 2612 n.7, it also left these courts with enough flexibility to cope with the peculiar circumstances of their districts. If *Frazier*

> provides any guidance to the instant case, it is that we may, not must, use our inherent supervisory power to strike down improper residency requirements. If we do invoke our supervisory authority, we must discern whether the challenged residency requirements are "unnecessary and irrational," *Id.* at 2612, by balancing our supervisory interest in preserving "the integrity of the federal system," *Id.* at 2612 n.7, against those competing interests articulated by the district court in support of the residency requirements.

Pet. App. 22a-23a.

This appeal squarely presents the issue whether *Frazier* was intended to invalidate all residency requirements, or to prescribe a test for validity. The applicants argued before the court of appeals that *Piper* and *Frazier* invalidated all bar residency requirements. The dissent below urged that the decisions cited be read as imposing a fact-based test.[14] The circumstances of the courts of the United States Virgin Islands fully justify the residency requirement of the district court, and court of appeals' decision here should be reversed.

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[14] As the dissent noted:

> [a]t argument appellants Esposito and DeVos pointed to Justice White's concurring opinion in *Piper*, 470 U.S. at 288-89 (White, J., concurring), as support for their assertion that *Piper* and *Frazier* invalidated residency requirements wholesale. The Virgin Islands Bar Examiner, on the other hand, noted that, at the time of the Court's decision in *Frazier*, there were two dozen federal district courts that had residency requirements. *Frazier*, 788 F.2d at 1054 n.7. These requirements were not explicitly invalidated by the Supreme Court, and I believe that their current vitality is an open question.

Pet. App. 22a n.9.

II. THE DISTRICT COURT OF THE VIRGIN ISLANDS IS LEGALLY AND CONSTITUTIONALLY DISTINCT FROM OTHER LOWER FEDERAL COURTS, AND INVALIDATING ITS RULES OF PRACTICE UNDER THE SUPERVISORY POWER IS IMPROPER.

In treating *Frazier* as requiring the use of the supervisory power to strike the Virgin Islands residency rule, the court of appeals failed to recognize the significant legal distinctions between the Eastern District's rule in *Frazier* and the rule at issue here which is promulgated by the district court but which also applies to the territorial courts.

In the case of the unincorporated territories, the Constitution expressly gives to the Congress the power to "make all needful Rules and Regulations," U.S. Const. Art. IV Sec. 3, cl. 2. Under this power, Congress had, until 1984, given to the District Court of the Virgin Islands, created by federal law, the authority to prescribe the rules of "practice and procedure of the inferior courts" of the territory, created by local law, Revised Organic Act of the Virgin Islands of 1954 § 21(b), 48 U.S.C. 1611 (b), as well as "the duties of the judges and officers" thereof, together with a substantial additional series of judicial matters. Revised Organic Act of the Virgin Islands of 1954 § 23, 48 U.S.C. § 1613. The district court was, by the same act, directed to apply the Federal Rules of Civil Procedure, including those rules governing admiralty and bankruptcy. *Id.* This special statutory grant implied the intent of Congress to confer on the federal court in the territory the responsibility and the right

to develop rules of practice particularly suited to the needs and circumstances of that jurisdiction. Revised Organic Act of the Virgin Islands of 1954, 48 U.S.C. §§ 1541-1645 (1982). In 1984, the law was amended by Congress to grant the power to prescribe rules of practice in the territorial courts to those courts or the local legislature. Revised Organic Act of the Virgin Islands of 1954 § 21, 48 U.S.C. § 1611. This allocation and reallocation of authority to prescribe the rules of practice in the territory's courts clearly constitutes a congressional determination to permit locally determined rules suited to the territory's special needs. In the face of this constitutional and statutory history, to hold that the Virgin Islands must be swept into a uniform national rule of admission to practice is to disregard the congressional allocation of authority.

The court of appeals' excessively broad reading of *Frazier* treats the unincorporated territories as if they were legally indistinguishable from the contiguous states. It also ignores the unique and politically necessary jurisdictional hybrid which the federal district courts in the territories are, as if their jurisdiction and governing law were like the federal courts of Louisiana, simply an integrated part of the standardized system of judicial units applying a uniform "specialized federal law," requiring a "mobile" and "specialized" federal bar.

In contrast, the federal courts of the Caribbean and certain of the Pacific territories have been crafted by Congress under its Article I powers to function only in part as federal trial courts but also in other ways. For example, the District Court of the Virgin Islands Appellate Division is the court of appeals for the territorial

courts. Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. § 1613a. It has concurrent jurisdiction in civil matters where as little as $500.00 is at issue. Revised Organic Act of the Virgin Islands of 1954 § 22, 48 U.S.C. § 1612. It has concurrent jurisdiction, too, in all criminal matters in which the maximum penalty exceeds a fine of $100.00 and imprisonment for six months, whether the offense is federal or territorial. Revised Organic Act of the Virgin Islands of 1954 § 22(b), 48 U.S.C. § 1612(b). *See also,* Revised Organic Act of Guam, 48 U.S.C. § 1424 (establishing jurisdiction of the District Court of Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Art. IV, Pub. L. 84-241, 90 Stat. 263 (reprinted in note following 48 U.S.C.A. 1424 (Supp. 1988)) (establishing jurisdiction of the District Court of the Northern Mariana Islands).

Of course, the District Court of the Virgin Islands is a court "established by Act of Congress," and it enjoys the authority to "prescribe rules for the conduct of [its] business" under 28 U.S.C. § 2071, as do the district courts of the United States; but it is not a constitutional court. *Government of the Virgin Islands v. Bell,* 392 F. 2d 207 (3d Cir. 1968). The fact that federal law has granted to the District Court of the Virgin Islands the jurisdiction of a United States district court over causes arising under the Constitution, treaties and laws of the United States does not make the territorial court "a United States district court." *Ottley v. DeJongh,* 149 F. Supp. 75 (D.V.I. 1957).

Until October 5, 1984, not only the rules of practice of the district court, but also "the rules governing the practice and procedure of the inferior courts, and pre-

scribing the duties of the judge and officers thereof, oaths and bonds, the times and places of holding court, and the procedure for appeals to the district court . . . [were] established by the district court." Revised Organic Act of the Virgin Islands of 1954 § 21(c), 48 U.S.C. § 1611(c). With the enactment of Pub.L. 98-454, 98 Stat. 1737, in 1984, the lower courts were authorized to promulgate their own "rules governing practice and procedure," but they have not in fact done so, adhering to the rules of practice established by the district court, as the highest court of the territory. Thus, the rules of practice of the district court are the rules of admission for the Virgin Islands courts as a whole.

Neither do the district courts of the unincorporated territories offer to litigants the same range of Constitutional guarantees as do the federal courts elsewhere, and this discrimination has long been upheld. *Rivera v. Government of the Virgin Islands*, 375 F.2d 988 (3d Cir. 1967) (holding the right to presentment by grant jury is not guaranteed in the unincorporated territories.). *Accord, United States v. Canel*, 708 F.2d 895 (3d Cir.), *cert. denied sub. nom., Figueroa v. United States*, 464 U.S. 852 (1983) (holding the right to trial in federal court before a judge granted life tenure does not apply to the unincorporated territories); *Government of the Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974); *United States v. Montanez*, 371 F.2d 79 (2d Cir.), *cert. denied*, 389 U.S. 884 (1967). In sum, the federal courts in the territories have a judicially sanctioned tradition of distinction from the federal norms, and this tradition had been endorsed by the Third Circuit until *Frazier*.

While this Court may construe its powers under section 2072 of Title 28 of the United States Code as includ-

ing the authority to prohibit local district court rules of practice which are "irrational and unnecessary," the local rule in effect in the Virgin Islands stands in a unique position serving as a rule of practice not merely for a federal trial court but for the territorial court system as a whole. This rule, in the context of a court so legally and constitutionally unlike the other federal district courts, should not be eradicated by a single nationwide ruling of uniformity. In the Virgin Islands, the judicial divisions "comprised of islands and cays," Revised Organic Act of 1954 § 25, 48 U.S.C. 1615, have a statutory and constitutional framework as different from the federal courts of the states as their geographical site is from the contiguous states. Like those geographical differences, the legal and constitutional differences require recognition that the District Court of the Virgin Islands has a special congressionally granted role in the formulation of territorial rules of practice and procedure. If the Court would not consider it appropriate to invalidate such a rule promulgated by a state supreme court, it would not be appropriate to do so here.

III. THE UNINCORPORATED TERRITORIES SHOULD BE ALLOWED THE FLEXIBILITY TO DEVELOP THEIR OWN RULES OF PRACTICE, ADAPTED TO THEIR CULTURAL ENVIRONMENT, UNLESS THOSE RULES ARE INESCAPABLY WRONG.

Particularly in the unincorporated territories, under the political umbrella of United States citizenship but not destined for statehood, linguistic, historical and other cultural distinctions render the people and their laws profoundly unique to the American experience. This cultural and historical disparity has led this Court in the past to

recognize the importance of treating the territories with special deference. For example, in the case of the Commonwealth of Puerto Rico (no longer an unincorporated territory, but having a similar legal and historical relationship) this Court has said:

> The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong." *Bonet v. Texas Co.*, 308 U.S. 463, 471.

Fornaris v. Ridge Tool Co., 400 U.S. 41, 42-43 (1970).

Similarly, the Territory of Guam has been recognized as entitled to special deference in its legal relationship to the higher courts of the United States:

> The District Court of Guam serves in two distinct capacities. It can act as a Federal District Court. The District Court of Guam sitting as the Appellate Division also functions as a local territorial appellate court, the jurisdiction of which is determined exclusively by the Guam legislature. 48 U.S.C. § 1424(a). Since we are required to give a high degree of deference to territorial courts' determinations of local law, we must affirm a decision of the Appellate Division "on a matter of local law, custom or policy if the decision is based upon a tenable theory and is not inescapably wrong or manifest error." *Schenck v. Gov't of Guam*, 609 F.2d 387, 390 (9th Cir. 1986); *Accord People of the Territory of Guam v. Yang*, 800

F.2d 945, 946 (9th Cir. 1986); *Electrical Construction & Maintenance Co. v. Maeda Pacific Corp.*, 764 F.2d 619, 620 n.1 (9th Cir. 1985); *Laguana v. Guam Visitors Bureau*, 725 F.2d 519, 520 (9th Cir. 1984); *Chase Manhattan Bank v. Gems-by-Gordon*, 649 F.2d 710, 712 (9th Cir. 1981)

Aguon v. Calvo, 829 F.2d 845 (9th Cir. 1987).

While the issue before the courts in *Fornaris* and *Aguon* was one of statutory interpretation, the policy of deference to a territorial court's determination on matters of custom and policy in judicial administration is equally justified. *Accord, People of the Territory of Guam v. Fejeran*, 687 F.2d 302 (9th Cir. 1982), *cert. denied*, 460 U.S. 1045 (1983).

Like the people of Puerto Rico and Guam,[15] the people of the Virgin Islands share a non Anglo-Saxon ancestry. Their colonial past includes cultural and linguistic imprints of Danish, African, French, Dutch, and Spanish origin,[16] and their modern culture is deeply affected by

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[15] The federal district courts of Puerto Rico require as a condition of the right to practice law, that applicants pass a three day bar examination conducted entirely in Spanish. While that rule might be "irrational or unnecessary" for the practice of law before the ditrict courts of the United States in most locations, in Puerto Rico the rule has obvious and rational objectives.

[16] *See*, **D. Taylor, Languages of the West Indies** 250-51 (1977) (listing various English words and their translations into Dutch Creole spoken in St. Thomas and St. John, United States Virgin Islands); **L. Emanuel, Surviving Africanisms in the Virgin Islands English Creole** 9-11 (1972) (explaining that the dialect known as Dutch Creole spoken in the Virgin Islands is a mixture of European languages and native tongues of Africa); **R. Hall, Jr. Pidgin and Creole languages** 12, 16 (1969) (explaining that varieties of pidginized English and Dutch are spoken in the Virgin Islands).

their identity as an island community in the West Indies. This results in a need for respectful acknowledgment that not every traditional American viewpoint is necessarily well suited to the needs and values of the people of the territory, and the same deference this Court has found warranted in the case of Puerto Rico should also be accorded the Virgin Islands.

The Virgin Islands residence rule, then, should not be stricken unless the adoption of that rule by the District Court of the Virgin Islands is "inescapably wrong." The Third Circuit, however, failed to apply that appropriate standard of deference to the District Court of the Virgin Islands, and its decision here should be reversed.

IV. THE VIRGIN ISLANDS RESIDENCY REQUIREMENTS DO NOT VIOLATE CONSTITUTIONAL STANDARDS.

The court of appeals did not find the Virgin Islands residency requirements to be constitutionally infirm. Instead, it felt compelled by the Court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987) to apply its supervisory power and invalidate those requirements, thus not reaching the constitutional issue. Pet. App. 8a-9a. However, in *Frazier*, the Court noted that while its supervisory power over federal courts allows it to protect the federal system, "its authority over state court bars is limited to enforcing federal constitutional requirements." 107 S.Ct. at 2612 n.7.

Because of the Virgin Islands' unique status and location, more fully described in section II of this brief, the courts of the Virgin Islands are more reasonably subject

to the standards applied to the state courts than to those applied to the federal district courts. Accordingly, the circuit court should have applied, as did the district court, federal constitutional standards to the review of the territorial rule.

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), it was established that a nonresident who passes a state bar examination, and is otherwise qualified to practice law, has an interest in practicing law that is protected by the Privileges and Immunities Clause of Article IV, Sec. 2 of the United States Constitution. The Court noted, however, that the protection afforded by the clause is not absolute and does not preclude discrimination against nonresidents where there is a substantial reason for the difference in treatment and the discrimination bears a close relation to the state's objective. *Piper*, 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). These principles were recently affirmed in the case of *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669 (U.S. June 21, 1988) (1988 U.S. Lexis 2746).

Applying the *Piper* standards to the Virgin Islands[17], the district court, in granting summary judgment to the Bar Examiners and to the Bar, concluded that the territory's residency requirements do not violate the Privileges and Immunities Clause. The district court found that the territory's geographic isolation and the attendant difficulties in transportation and communication justify the residency requirements. Pet. App. 67a. Specifically, the

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[17] The district court's opinion preceded the Court's decision in *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669 (U.S. June 21, 1988).

district court found that all of the factual circumstances described above in relation to the *Frazier* test, which qualify the Virgin Islands rule as necessary and rational, were "substantial reasons" justifying the difference in treatment in the territory between residents and nonresidents. Those same circumstances establish a substantial relationship between the rule and the territory's important objectives previously discussed in section I of this brief.

In applying the constitutional test to the residency rule in *Piper*, the Court specified that there was no evidence to support the state of New Hampshire's claim that nonresidents would be "less likely to keep abreast of local rules and procedures." 470 U.S. at 285-86. Neither was there any justification for the assumption that nonresidents would be less ethical than resident lawyers. While the Court agreed that nonresidents might at times be "unavailable for court proceedings . . . [or] pretrial hearings . . . held on short notice . . ." it assumed "that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues [would] reside in places reasonably convenient to [the state]." 470 U.S. at 286-87. For distant nonresidents, the court noted a less restrictive but valid rule could require the distant lawyer to retain a local attorney to be available for unscheduled matters. Finally, the Court rejected as unfounded the assumption that nonresidents would be "disinclined to do their share of *pro bono* and volunteer work." 470 U.S. at 287.

In contrast, as the discussion set forth above in section I explains, neither those judicial assumptions nor the facts in the New Hampshire/Vermont situation apply to

the Virgin Islands. The District Court of the Virgin Islands found that nonresidents would not fail to keep abreast of local law because they were less conscientious or responsible but because they simply lacked practical access to current Virgin Islands law. Pet. App. 65a. The district court did not assume nonresidents were any less ethical or honest than resident lawyers, but rather that the very small Virgin Islands Bar, having limited resources, could never adequately monitor a nationwide membership. Pet. App. 67a. As to availability for court proceedings, the Court's assumption in *Piper* that the nonresident lawyers most likely to seek admission would be residents of reasonably convenient locations was not applicable in the instant case. The clear evidence in this case involving a remote island jurisdiction demonstrated there is not a reasonably convenient place of residence for nonresidents. Indeed, by definition all nonresidents of the territory would be residents of distant places. Since the Virgin Islands allows *pro hac vice* admissions for nonresidents, so long as they retain local counsel, the alternative identified in *Piper* as a permissible "less restrictive rule," is already in place in the Virgin Islands. Moreover, the Virgin Islands court identified certain other overriding problems of judicial administration, including a very small judiciary and an exceptionally heavy case load, which necessitate high efficiency in the processing of case loads inconsistent with interruptions or delays to accommodate nonresidents. Pet. App. 65a. Finally, the Virgin Islands' need for all lawyers to share the duty to represent indigent criminal defendants is not merely a concern about whether nonresidents will be good citizens or charitable in character. It is a concern about a carefully con-

structed and critically important system of mandatory legal obligations, presently shared by all who enjoy the right to practice law in the territory, which the district court concluded would be absolutely unworkable with nonresidents.[18]

On all counts then, as more fully detailed in section I, the Virgin Islands rule survives scrutiny under *Piper*. The applicants, however, urged below that while the Virgin Islands rule may be based on substantial reasons, especially insofar as it provides representation to indigent defendants, there are less restrictive means for achieving those goals.

They propose (1) "assigning . . . cases to [resident] attorneys who have become members of a pool of criminal defense attorneys by virtue of their experience and willingness to participate." Pet. App. 30a. This proposal, however, makes the startling assumption that experienced trial lawyers in the Virgin Islands would voluntarily take on the duty to represent all the indigent defendants in the territory now represented by the bar as a whole, at the nominal rate allowed by law for such service, a rate which barely exceeds the going salary for the legal secretary required to type their pleadings. *See,* 18 U.S.C. § 30006A (d). Absolutely no evidence was presented below that such an upwelling of desire to increase their service over its already substantial level exists among Virgin Islands lawyers.

Applicants' second "less restrictive" suggested rule was to require nonresidents to associate with resident

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[18] The *Piper* court did not imply that mandatory legal *pro bono* work was beyond the authority of the state bars.

attorneys, the latter presumably to fulfill their nonresident colleagues' duty under Rule 16. Even if some resident lawyers could be found who were willing to double their share of such duties, however, the Rule as written was designed to insure that "*all* lawyers who benefit from being members of the Virgin Islands bar share equally and directly in the responsibility of representing indigent criminal defendants." Pet. App. 31a.

Alternatively, applicants propose that the resident bar's trust accounts could be made to bear interest to pay the cost of funding indigent representation or that nonresidents could be assessed a special fee for this purpose. Pet. App. 30a. Besides ignoring the purpose of the rule already cited, these suggestions either place the cost of the nonresidents' duty on resident lawyers or assume the assessment of a tremendous annual fee on nonresidents, a step which would be debatable as to the degree of restrictiveness.

For all these reasons, the Virgin Islands rule, unlike the New Hampshire rule examined in *Piper,* is fully consistent with the Privileges and Immunity Clause.

Neither is the rule here inconsistent with the Court's evaluation of the rule presented in *Supreme Court of Virginia v. Friedman.* In *Friedman,* Virginia's justification for its residency requirement for attorneys seeking admission "on motion," that is without taking Virginia's bar examination, was that attorneys admitted on motion would not have the same commitment to service and familiarity with Virginian law that is possessed by applicants securing admission upon examination. Further, it reasoned that the residency requirement facilitated enforce-

ment of Virginia's full time practice requirement. 56 U.S.L.W. at 4671.

In rejecting Virginia's arguments, the Court stated, "the question is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents." *Id.* In Virginia's case, because of its additional full time practice requirement, the court found no reason to assume that nonresident attorneys seeking admission to the bar on motion "will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties." *Id.*

While recognizing that the state can be justifiably concerned with ensuring that its attorneys keep abreast of legal developments, the court suggested that these concerns might be satisfied by requiring mandatory atttendance at periodic continuing legal education courses. Also, it was suggested that the state's interest that the nonresident bar member does his or her share of volunteer and pro bono work could be met by requiring that a "nonresident bar member, like the resident member, could be required to represent indigent clients and perhaps to participate in formal legal aid work." *Id.* (citing *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985)). In *Friedman,* the Court held that Virginia had failed to make a showing that its discrimination against nonresidents bore a close relation to the achievement of substantial state objectives.

In the instant case, for all the reasons discussed in relation to *Piper,* including the distant location of the Virgin Islands from the United States mainland, the district

court properly found that the discrimination against nonresidents applying for bar membership did bear a close relation to the achievement of the territory's objectives that its bar members do their share of mandatory criminal defense of the indigent, as well as pro bono work, appear promptly for all judicial proceedings, and remain abreast of changes in the law of the Virgin Islands. Pet. App. 67a.

It is unrealistic to expect that attorneys living thousands of miles from the Virgin Islands could adequately represent indigent defendants or otherwise perform the pro bono work required of bar members in the territory. Moreover, again because of the great distances involved, it is also unrealistic to expect the nonresident lawyers to participate significantly in extremely limited local continuing legal education courses and other bar association activities, as well as participate in other civic duties in the Virgin Islands.

In summary, the district court by summary judgment decided that the Virgin Islands residency requirements do not violate federal constitutional standards. Likewise, the circuit court made no finding of constitutional infirmity. Unless the court establishes a blanket prohibition against bar residency requirements, which it has thus far declined to do, the record supports the findings of constitutionality.

CONCLUSION

For the foregoing reasons, petitioners, Geoffrey W. Barnard, in his capacity as Chairman of the Committee of Bar Examiners, and the Virgin Islands Bar Association, submit that a majority of the United States Court of Appeals for the Third Circuit has given *Frazier v. Heebe* too broad an interpretation. Petitioners therefore urge this court to enter judgment reversing the decision of the United States Court of Appeals for the Third Circuit below.

DATED: August 15, 1988

Respectfully Submitted,

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